Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

BILLIE J. SAUNDERS, individually and as Personal Representative of the Estate of James E. Saunders, Deceased; JAMES E. SAUNDERS, deceased

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ Of Certiorari
To The United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Brian J. Iller
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Question Presented for Review

Whether the Ninth Circuit decision in this Federal Tort Claims Act case is directly and irreconcilably inconsistent with established state law precedent on the public duty doctrine.

Parties to Proceeding

PETITIONERS:

BILLIE J. SAUNDERS, individually and Personal Representative of the Estate of James E. Saunders, Deceased; JAMES E. SAUNDERS, deceased.

RESPONDENT:

UNITED STATES OF AMERICA.

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1. CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

This is a Federal Tort Claims Act (FTCA) case brought pursuant to 28 U.S.C. § 2674. The Ninth Circuit affirmed a summary judgment in favor of the defendant United States by Order dated May 25, 2004. The Ninth Circuit denied a petition for rehearing on July 20, 2004. Rules 13.1 and 13.3 of this Court allow the filing of a Petition for Certiorari within 90 days of the entry of the order denying the petition for rehearing because the United States is a party. This Court has jurisdiction to review on a writ of certiorari the judgment pursuant to 28 U.S.C. 1254 and U.S.Sup. Ct Rule 10(a).

2. STATUTES INVOLVED IN THIS CASE:

28 U.S.C. § 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 1346(b)(1):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

8 U.S.C. § 1226:

> (C) Detention of criminal aliens
>
> > (1) Custody
> >
> > The Attorney General shall take into custody any alien who--
> >
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(I) of this title on the basis of an offense for which the alien has been sentence [FN1] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

3. CONCISE STATEMENT OF THE CASE.

a. Facts Material to Consideration of the Questions Presented.

On October 7, 1999, Washington State Patrol Trooper

James Eric Saunders ("Trooper Saunders"), was murdered by a criminal alien, Nicolas Solorio Vasquez ("Vasquez"), during a routine traffic stop. (ER 123) Vasquez was free to murder Trooper Saunders because the Immigration and Naturalization Service ("INS") had failed to take him into custody upon his release from Franklin County Jail, despite its obligation to take criminal aliens into custody under 8 U.S.C. § 1226©), and despite the fact that INS had been faxed notice that Vasquez was being held by Franklin County jail. (ER 124) This case is brought by Trooper Saunders' wife to recover damages suffered due to his death.

Following the death of Trooper Saunders, the Immigration and Naturalization Service ("INS")[1] came under public scrutiny over the fact that Vasquez had not been

1. The Immigration and Naturalization Service ("INS") is an agency of the U.S. Department of Justice and the Border Patrol is a sub-agency of the INS, hereinafter collectively referred to as INS.

detained and deported. (ER 126) It is not disputed that at the time of his arrest, at the time of his release on bail, and at the time of his murder of Trooper Saunders, Vasquez was an illegal alien and aggravated felon subject to detention and deportation pursuant to 8 U.S.C. § 1226(c)(hereinafter the "mandatory detention statute.") In response to the public scrutiny, INS carried out an internal investigation and issued a report with a set of "talking points" for its agents in which INS claimed:

> "During this two week time period, the Pasco (sic) office was not notified that Solorio was in custody. Had the agent assigned to the jail or any of the three other INS officers been aware of his presence in the facility, a hold would have been placed."

(ER 126)

INS initially claimed (falsely as it was later proven):

> "Talking Points
>
> * * *
>
> Is the Union's claim that the detail to Arizona resulted in no hold being

placed valid?

* * *

Agent Holguin indicated that he would have placed an immigration hold on Solorio, had he been aware of his presence.

* * *

Is the reason no immigration hold was placed on Solorio the fault of Franklin County for failing to notify INS?

* * *

It is true that had the INS been notified of Solorio's presence, an immigration hold would have been placed. However, jails in Washington State are under no legal obligation to notify the INS of suspected criminal aliens. Generally, Franklin County and other counties do a very good job notifying INS, but only as a courtesy."

(ER 126)

Discovery in this case demonstrates beyond any dispute that the INS was, in fact, notified that Vasquez was in Franklin County custody, but its agents failed to act on that notification.

INS, contrary to its "talking points," has now admitted that its office did receive a fax from Franklin County Jail notifying INS that Vasquez was in custody. (ER 128) As a matter of policy and procedure, the Franklin County Jail faxes to the Richland INS office the daily booking sheet naming all persons booked into the Franklin County Jail. (ER 127) That booking sheet sets forth the name, place of birth and category of crime for each person in custody. (ER 128) The booking sheet containing the name of Nicolas Solorio Vasquez, his place of birth as Mexico and the charges for which he was arrested, was faxed to the INS office on July 27, 1999. (ER128) Franklin County's fax log evidences that the fax notifying INS that Vasquez was in custody had indeed been sent and received by the INS at 9:21 a.m. on July 27, 1999. (ER128) INS Agent Donald Holguin, who was assigned to the Franklin County Jail at the time, subsequently admitted on deposition that the Richland INS office did, indeed, receive the

fax, and was thereby notified of Vasquez' incarceration. (ER128) Thus, INS had fourteen days within which to place a hold on Vasquez before he was released on bail. (ER128-129) INS admits that the fax contained sufficient information that it should have caused INS to check Vasquez against the INS data bank, which would have led to the discovery that he was an illegal alien and aggravated felon, resulting in the issuance of a hold, a process taking approximately five minutes to complete. (ER 128-129; 131)

In addition to the fax notification of Vasquez' incarceration, INS agents visited the Franklin County Jail on at least six separate occasions between July 26, and August 9, 1999. (ER129) INS had "behind the counter" privileges, which gave them access to all of the records of all persons in custody at the jail at the time of their visit. (ER 129) Inexplicably, INS agents visiting the jail only check the booking sheet for the day of their visit. (ER 130) Thus, if the

INS agents do not check the faxes for the days they do not visit the jail they overlook any alien placed in custody on those days. (ER 130)

To determine why Vasquez was not placed on an INS hold, Saunders deposed the six agents assigned to the Richland office, which had jurisdiction over the Franklin County Jail, and their supervising agent in Spokane. The Richland office had no policy or procedure in place for the recording and distribution of incoming faxes. (ER 130) The agents would simply come by the fax machine and retrieve whatever faxes were of interest to them. (ER130) In addition, one of the agents apparently routinely distributed the faxes to the various agents in the office and believes that he most likely would have picked up the July 27, 1999 fax from Franklin County and placed it on Don Holquin's chair or desk. (ER 130)

Agent Holguin believes the failure to detain Vasquez and take him into custody was an oversight because he was

only in the office for three or four days following receipt of the fax and then left on a 30-day reassignment or leave. (ER 131) Holguin, who had personally deported Vasquez on at least two prior occasions, was unable to give any further explanation as to why Vasquez was not placed on hold. (ER 131) Vasquez was well known to the INS having been deported on five prior occasions; two voluntary and three involuntary. (ER 131) Holguin knew Vasquez by name. (ER 131)

Indeed, Vasquez had previously been deported by INS while awaiting trial on an first degree assault charge. (ER 125) Other agents in the office who carried out Holguin's duties in his absence were unable to explain why they failed to place a hold on Vasquez. (ER131)

Had INS done its duty and placed a "hold" on Vasquez, Trooper Saunders would not have encountered Vasquez on October 7, 1999, and Trooper Saunders would be alive today. Had Vasquez been placed on an INS hold and remained in

custody until trial, it is likely he would have been convicted and sentenced to 28 to 36 months confinement. (ER 133) Conversely, if he had been placed on hold and nevertheless posted cash bail, Vasquez would have been immediately taken into INS custody and deported to Mexico. (ER 133) If Vasquez would have been found not guilty, he would have been deported immediately after trial. Further, if Vasquez had been deported before trial, the felony charges for trafficking in narcotics would have remained for the indefinite future, making it unlikely that he would have returned to the State of Washington following his deportation because he would be subject to rearrest and trial. (ER 133)

B. Basis for Federal Court Jurisdiction in the Court of First Instance.

This is a Federal Tort Claims Act case brought pursuant to 28 U.S.C. § 2674. The District Court for the Eastern District of Washington had jurisdiction pursuant to 28

U.S.C.A.§1346.

4. ARGUMENT FOR ALLOWANCE OF WRIT.

The Writ should be granted because the Ninth Circuit's interpretation of the Washington state "public duty doctrine" directly and irreconcilably conflicts with the decisions of the Washington Courts which establish the state law that the Ninth Circuit is obligated to follow in this FTCA action. In ignoring that Washington case law, and holding the action is barred as a matter of law, the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup Ct. Rule 10(a).

In Federal Tort Claims Act (FTCA) actions, the liability of the United States is governed by the law of the state in which the alleged acts or omissions occurred. 28 U.S.C. § 1346 (b).

The Ninth Circuit affirmed the dismissal of Trooper Saunders' claim based on its application of the "public duty doctrine" established by Washington case law. In doing so, it rejected Saunders' argument that two exceptions to the doctrine applied: (1) The "legislative intent exception;" and (2) the "failure to enforce exception."

In rejecting application of those exceptions, the Ninth Circuit's reasoned:

> However, Saunders' proposed class must logically be "potential victims of criminal aliens" because there is no way, ex ante, to predict who in the United States will be a victim of a crime by a criminal alien."[footnote 2]

---

[2] As Saunders' proposed class can only be potential victims of criminal aliens, her reliance on *Yonker v. State Dep't. Of Soc. & Health Serv.*, 930 P.2d 958 (Wash.Ct.App. 1997) and *Donaldson v. City of Seattle*, 831 P.2d 1098 (Wash.Ct.App. 1992)–both of which involved actual victims who had already been brought to law enforcement's attention–is unavailing.

> Because any member of the public at large, without further narrowing, is theoretically a "potential" victim of criminal aliens, Saunders' argument is nothing more than an assertion that criminal aliens are a threat to "public safety." A threat to the public at large creates a duty owed to all, not individually to Saunders, and thus Saunders cannot take advantage of either exception to the public duty doctrine.

This interpretation is impossible to reconcile with precedent established by Washington appellate cases applying the exceptions to the public duty doctrine. First, the Washington Supreme Court has held that a municipality may be liable to the victims of drunk drivers, a class equally as large as the victims of criminal aliens. *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987). There, the Washington Supreme Court held that the Town of Forks' failure to arrest an obviously intoxicated driver was actionable under the "failure to enforce" exception. The court held that Washington statutes mandating "protective custody" of intoxicated persons created a sufficiently specific tort duty to

allow victims of drunk drivers to recover against the Town. Nothing in the *Bailey* case indicates that the police officer (or any other law enforcement officer) had any prior contact with or knowledge of the plaintiff, who was a passenger on a motorcycle which was later hit by the drunk driver. Indeed, the *Bailey* court expressly held that no such contact was necessary:

> Facts alleged by Ms. Bailey satisfy all three requirements of the failure to enforce exception. First, the Forks police officer was a governmental agent with a duty to enforce statutory requirements. State statutes prohibit and establish criminal sanctions for driving or being in physical control of a motor vehicle while under the influence of alcohol. RCW 46.61.515. Moreover, under RCW 70.96A.120(2) [FN1], a police officer has a statutory duty to take into custody a publicly intoxicated individual. Second, Ms. Bailey alleged that the police officer took no corrective action and possessed actual knowledge of statutory violations. According to Ms. Bailey, the officer allowed Medley to take the wheel of the pickup truck and drive away even though Medley's intoxicated state was apparent to the officer.

FN1. "... a person who appears to be incapacitated by alcohol and who is in a public place or who has threatened, attempted, or inflicted physical harm on another, shall be taken into protective custody by the police or the emergency service patrol ..." RCW 70.96A.120(2).

Finally Ms. Bailey, riding as a passenger on a motorcycle, came within the class RCW 70.96A.120(2) and RCW 46.61.515 were intended to protect. This court and the Legislature have recognized the important public policy interests inherent in the effective removal of drunken drivers from the roads and the concomitant problem of deciding who should bear the costs for injuries and deaths caused to innocent motorists. [Citations Omitted] Undoubtedly the Legislature enacted RCW 46.61.515 in its entirety, and RCW 70.96A.120(2) in part, to protect the users of public highways from accidents caused by intoxicated drivers. When Ms. Bailey sustained her injuries she was undoubtedly a member of the class to be protected. When a governmental agent knows of the violation, a duty of care runs to all persons within the protected class, not merely those who have had direct contact with the

> governmental entity. For example, in *Campbell v. Bellevue*, 85 Wash.2d 1, 530 P.2d 234 (1975), a city electrical inspector knew of the extreme danger created by a nonconforming underwater lighting system, which later electrocuted the plaintiff's wife. Even though the plaintiff had personally complained of the dangerous condition, we held that a duty of due care existed with reference to "those persons or class of persons residing within the ambit of the danger involved." *Campbell*, at 13, 530 P.2d 234. Like an electrical inspector who leaves a live electric wire unattended, a police officer who allows an obviously drunk driver to continue on his or her way sets loose an "inherently dangerous instrumentality".

(Underlining added.)

The Washington Court of Appeals cases the Ninth Circuit distinguished are equally favorable to Saunders. In *Yonker*, 930 P.2d 958, at pp. 962-63, the court held that "children and dependents who may be abused or neglected" by child abusers constitute a sufficiently particular and circumscribed class, rejecting an argument that such a class is too broad to satisfy the exception to the public duty doctrine.

In doing so, the *Yonker* court relied on *Donaldson*, 831 P.2d 1098, also distinguished by the Ninth Circuit, as follows:

> The requirement is not that the class be small or narrow, but that it be "particular and circumscribed." *Donaldson*, 65 Wn.App. At 667, 831 P.2d 1098. "Particular" means "involving, affecting, or belonging to a part rather than the whole of something: . . . not universal." Websters Third New International Dictionary 1647 (3d Ed. 1976). "Circumscribe" means "to set limits or bounds to: . . . to define, mark off or demarcate carefully." Webster's Third new international Dictionary 410 (3d Ed. 1976). Neither of these qualifiers necessarily means that the protected group must be small or narrow. Indeed, such is not the requirement. For example, the class of persons protected in *Donaldson*, victims of domestic violence, unfortunately cannot be described as small. It is, however, particular and circumscribed, as is the class sought to be protected here.

Yonker, 930 P.2d 958, at pp. 962-63 (Underlining added.)

Accordingly, it is clear under Washington law that "victims of a particular class of criminal" is sufficiently particular and circumscribed to satisfy the exceptions to the

public duty doctrine. Washington law recognizes that victims of drunk drivers have a cause of action against the authorities that failed to arrest the drunk drivers. Washington law recognizes that victims of child abusers have a cause of action against the authorities that failed to arrest the child abusers. Washington law recognizes that victims of domestic violence have a cause of action against the authorities that failed to arrest the spouse beater. These classes are no less particular and circumscribed than the class of victims of criminal aliens. Accordingly, the Ninth Circuit violated the statutory requirement that it apply the law of the state in which the case arose.

5. Conclusion.

The Ninth Circuits decision cannot be reconciled with these Washington decisions. The Ninth Circuit's reasoning is directly contrary to the Washington Court's reasoning. This Court should grant the writ to enforce the statute that

mandates that liability in FTCA claims are governed by the state law of the state in which the claim arose.

Dated this 18th day of October, 2004

Rettig, Osborne, Forgette

_____

By: Brian J. Iller

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLIE J. SAUNDERS, individual and as Personal Representative of the Estate of James E. Saunders, deceased; JAMES E. SAUNDERS, deceased,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 03-35157

D.C. No. CV-01-05099-RHW
Eastern District of Washington, Spokane

ORDER

Before: HUG, TASHIMA, and PAEZ, Circuit Judges.

Plaintiffs – Appellants' Petition for Rehearing by the panel pursuant to Federal Rule of Appellate Procedure 40(a) is denied.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 03-35157
CT/AG#: CV-01-05099-RHW

BILLIE J. SAUNDERS, individual and as Personal Representative of the Estate of James E. Saunders, deceased; JAMES E. SAUNDERS, deceased

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane) .

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 25, 2004.

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLIE J. SAUNDERS, individual and as Personal Representative of the Estate of James E. Saunders, deceased; JAMES E. SAUNDERS, deceased, Plaintiffs - Appellants, v. UNITED STATES OF AMERICA, Defendant - Appellee.	No. 03-35157 D.C. No. CV-01-05099-RHW MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted May 6, 2004
Seattle, Washington

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: HUG, TASHIMA, and PAEZ, Circuit Judges.

Billie Saunders, the widow of Washington State trooper James E. Saunders, appeals the district court's summary judgment ruling in favor of the United States dismissing her wrongful death action brought pursuant to the Federal Tort Claims Act ("FTCA"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[1]

We review *de novo* the district court's summary judgment ruling. *See United States v. City of Tacoma, Wash.*, 332 F.3d 574, 578 (9th Cir. 2003). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). Summary judgment may be affirmed on any ground supported by the record. *See Solomon v. Interior Reg'l Housing Auth.*, 313 F.3d 1194, 1196 (9th Cir. 2002). As to tort claims under the FTCA, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The determination of liability is based on the law of the sate where the alleged acts or omissions occurred.

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[1]Because the parties are familiar with the background facts, we do not recite them in detail.

28 U.S.C. § 1346(b). Therefore, Washington law controls here.

I.

The district court correctly granted summary judgment to the United States on Saunders' wrongful death claim.

Assuming, without deciding, that 8 U.S.C. § 1226(c) imposed a mandatory duty on the Border Patrol to place an immigration hold on Nicolas Solorio Vasquez, Saunders' claim nonetheless fails because she cannot show that the claim fits within any exception to the public duty doctrine.

The public duty doctrine provides "that for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one)." *Bailey v. Town of Forks*, 737 P.2d 1257, 1259 (Wash. 1987) (en banc)(citation omitted).

Saunders attempts to rely on two exceptions to the public duty doctrine. First, Saunders argues that the "legislative intent" exception is applicable. Under this exception, the public duty doctrine does not apply "when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons." *Id.* at 1260. Second, Saunders asserts that the failure to enforce

exception applies. Under this exception, "where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect" the public duty doctrine is not a bar to recovery. *Id.*

Saunders does not qualify for either exception because there is no evidence that 8 U.S.C. § 1226(c) was intended to protect anything other than the public at large. Indeed, the relevant legislative history supports this conclusion. *See, e.g.*, S. Rep. No. 104-48, at 1 (1995) ("Criminal aliens are a serious and growing threat to public safety . . .").

Under both exceptions, Saunders must identify either a "particular and circumscribed class" (the legislative intent exception), or a "class the statute intended to protect" (the failure to enforce exception) that is narrower than the public at large. Saunders asserts that § 1226(c) was designed to protect "victims of criminal aliens." However, Saunders' proposed class must logically be "potential victims of criminal aliens" because there is no way, *ex ante*, to predict who in the United

States will be a victim of a crime by a criminal alien.[2] Because any member of the public at large, without further narrowing, is theoretically a "potential" victim of criminal aliens, Saunders' argument is nothing more than an assertion that criminal aliens are a threat to "public safety." A threat to the public at large creates a duty owed to all, not individually to Saunders, and thus Saunders cannot take advantage of either exception to the public duty doctrine.

II.

As the public duty doctrine bar is sufficient to uphold the district court's summary judgment ruling in favor of the United States, we do not address the district court's alternative rulings that Saunders could not show proximate cause as a matter of law, or that the discretionary exception to the FTCA does not apply in this instance.

AFFIRMED.

2

As Saunders' proposed class can only be potential victims of criminal aliens, her reliance on *Yonker v. State Dep't. of Soc. & Health Serv.*, 930 P.2d 958 (Wash. Ct. App. 1997) and *Donaldson v. City of Seattle*, 831 P.2d 1098 (Wash. Ct App. 1992)–both of which involved actual victims who had already been brought to law enforcement's attention–is unavailing.